

Policy Brief

How to spend it right

A more democratic governance for the EU Recovery and Resilience Facility

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#Corona
#Recovery
#Democracy

The Recovery and Resilience Facility (RRF) will be the core of the EU's new Recovery Instrument to fight the economic fallout of the pandemic. Under the RRF, 310 billion euros in additional EU spending will be allocated by the European Commission to member states based on individual Recovery and Resilience Plans (RRPs). In this Policy Brief, we argue that the proposed governance to decide on the assessment of RRFs lacks democratic elements as parliaments are largely sidelined. This should be changed to ensure necessary political ownership at national and European level; to include a second pair of European eyes to prevent misspending; and to avoid a roll-back of EU democracy. Therefore, we propose that the European Parliament get a veto over the Commission decision assessing individual RRFs and allocating funds. National parliaments should also have a say in the adoption of the RRF of the respective member state.

27 May was a watershed moment for European integration: The European Commission proposed it be allowed to borrow up to 500 billion euros in the markets to fund the fight back against the economic fallout of the Covid-19 pandemic under a new Recovery Instrument (RI). If approved, the RI would [enable the EU to engage in classic deficit spending for the first time](#).

The bulk of this extraordinary EU spending, about 310 billion euros, will be channelled through a new Recovery and Resilience Facility (RRF). In addition to the spending, the RRF will also offer access to 250 billion euros in loans. The RI's economic and political success will therefore largely hinge on the ability of the RRF to deliver tangible macroeconomic impact while avoiding wasteful spending.

The RRF stands on sound legal grounds but its governance has a major flaw: Parliaments at national and European level are side-lined. This has three major drawbacks: First, RRF governance reduces spending decisions to purely administrative acts and thus fails to acknowledge the political nature of fiscal policy decisions unlocking billions of euros. This will sharply curtail political ownership for the decisions both at national and EU level. Second, by not involving the European Parliament, the process lacks a second pair of European eyes to ensure that the funds are spent responsibly. And, third, the envisaged governance represents a major step backwards in terms of the democratization of EU decision-making as, unlike under the regular EU budget procedure, the

directly elected representatives of European citizens would be shut out of major fiscal policy decisions binding the EU for decades to come.

To remedy these shortcomings, we propose two fundamental changes to RRF governance: First, national Recovery and Resilience Plans (RRPs) should receive national parliamentary approval before they are submitted to the Commission. This will create proper political debate in the national sphere on how best to use RRF spending. Second, the Commission decision approving the RRPs and allocating funds to them should take the form of a delegated act, giving the European Parliament a veto, as opposed to an implementing act as is currently envisaged. As a result, the EP would be able to scrutinise RRPs from a European perspective.

The proposed RRF governance

The Commission proposes the following governance for the RRF: The Regulation itself provides for a maximum amount each country can tap. To do so, member states submit to the Commission RRPs that include a number of reforms and investments the member states plan to finance through RRF expenditure. Reforms and investments must meet a number of general criteria that are outlined in the Regulation: they should e.g. contribute to addressing the country-specific recommendations under the European Semester and to facilitating the “green and digital transitions”. The RRPs must also include a cost estimate for these reforms and investments.

The Commission assesses these plans based on a rating system established in the annex of the Regulation that leaves ample room for qualitative judgment. It then takes a decision on whether an RRP is “satisfactory”. If it is, the member state is awarded the estimated costs of the measures included in the RRP up to the maximum cap. This decision takes the form of an implementing act, adopted in accordance with the so-called examination procedure; this means member states can veto the decision with qualified majority.

Once the Commission has cleared an RRP, the member state can ask for payments as soon as it has reached milestones as outlined in the RRP and agreed by the Commission. The Commission then decides on whether to pay out based on its assessment of whether and how the milestones have been met.

The proposed setup reduces the debate on how RRF funds are spent to a bilateral dialogue between the Commission and member state governments with wide discretion for both sides. The European Parliament has no say in this process. One important reason for this is that the funds borrowed by the Commission in the markets are accounted for as “externally assigned revenue”. Expenditure financed through such revenue is not part of the EU budget and therefore not subject to further approval by the co-legislators after the basic legal act, in this case the RRF Regulation, is adopted.

This process was directly borrowed from the governance that had been proposed for the Budgetary Instrument for Competitiveness and Convergence (BICC), the Eurozone budget that never saw the light of day. But there is of course a major difference: The BICC was supposed to reward member states for sensible measures with symbolic sums. Its proposed envelope at the time of its demise consisted of 12 billion euros for 19 countries over seven years. The RRF is not a symbolic instrument. It is fiscal policy. It is more than 25 times the size of the BICC.

BICC governance was itself modelled on a process used to distribute money under the EU’s structural funds, where member states and the Commission agree on “Partnership Agreements” in a similar fashion as proposed for the RRF. But here again, there is a key difference: Structural funds are meant to support catch-up within the EU over long periods of time, not to deliver a quick recovery in a crisis. They are under “shared management” between member states and the Commission and hence by design carry a high degree of national responsibility for spending. The RRF, in contrast, falls under the Commission’s direct management. And, unlike RRF money, the cohesion funds are spent under the EU budget umbrella.

RRF governance is thus modelled on two cases that have relatively little to do with what the RRF aims to achieve: Deliver sizeable fiscal stimulus to hardest-hit member states in a short time frame so as to make the EU as a whole swiftly recover from the crisis and make all member states more resilient to shocks. This should make us at least question whether this type of governance is really fit for purpose in this case.

Why the governance should be improved by involving parliaments

The proposed governance frames the Commission decision on the appropriateness of national RRFs as an administrative act that can be delivered according to objective criteria. The intention behind this is to get funds flowing as quickly as possible. It also gives the Commission a major gatekeeper role in the process. While this focus on efficiency is certainly important, this setup has three major drawbacks that could seriously undermine the instrument's success and should be improved:

- **The governance should foster the necessary political ownership:** The decision whether a national RRF is sufficient to allow member states to tap their share of RRF funding is far from a technical decision. It is deeply political: National shares amount to several percentage points of GDP in many cases. Big member states can tap several dozens of billions of euros. How these funds are spent has important distributional and economic consequences, both at EU and national level. This also means that there is a substantial risk that funds can be misspent and do real damage economically, socially, and politically. If this were to happen on a large scale, it would permanently damage the credibility of the EU in being trusted with fiscal policy-making again. Therefore, it would be dangerous for the Commission to take these decisions on its own. They require a broad national consensus that the measures included in RRFs are the right ones from a domestic perspective. And they require a broad consensus at the European level that the measures are the right ones from a European perspective. Such consensus comes about through scrutiny and public debate – and in the end through approval by citizens' representatives, i.e. parliaments. This is why governance should include a stronger role for both national parliaments and the European Parliament.
- **The governance should include a second pair of European eyes:** In the proposed setup, Commission and member state bilaterally negotiate the measures included in the RRF. The only body that will have a second look at these measures is a committee consisting of member state representatives as part of the comitology procedure that will check the Commission's draft implementing act. But experience so far with the European Semester suggests that member states are usually very reluctant to properly scrutinise each other when all depend on mutual approval. Hence, the process lacks a real second pair of eyes at the European level. This is particularly problematic as the Commission will be under immense pressure to ensure that the funds do indeed flow. Giving the European Parliament a veto on an equal footing with member states could remedy this shortcoming: The EP could then veto individual plans that include measures which manifestly go against common EU policy objectives. This would also strengthen the Commission's hand in the negotiations with member states.
- **The governance should avoid any roll-back of EU-level democracy:** Since the Lisbon Treaty, the EP as directly elected representation of EU citizens has been the full co-decision maker on EU budget matters on a par with the Council. This move plugged one of the most important remaining holes in the democratic legitimacy of EU decision making. Refusing the EP any say in how 310 billion worth of EU funds are spent would effectively reverse this major step in democratization. The argument that the revenue used for the RRF is externally assigned revenue and therefore not under EP control is formally correct, but politically unconvincing in this case: EU borrowing to make the revenue available does not in the first place bind member states but the EU budget. Thus, it directly affects the EP's capacity as future budget legislator. Hence, the EP should have a say equal to that of member states over whether and how the funds should be spent.

More democratic elements and a speedier process

To deliver these three necessary improvements, RRF governance should be changed in two ways:

- **Involve national parliaments:** The RRF regulation should include a binding obligation on member states to submit their RRFs to national parliaments for approval before finally sending them to Brussels once the negotiations with the Commission are concluded. This would ensure that there is a broad debate and consensus at national level on the proposed measures and would go a long way to making sure that the measures will be implemented in a timely fashion by the member state once the RRF is approved.

- **Involve the European Parliament:** The Commission decision on the assessment of the RRFs and the allocation of the funds should become a delegated act. This would give both the Council and the European Parliament a right to veto the decision. The box below explains the legal details of this change. In the “Interinstitutional Agreement on budgetary discipline, cooperation on budgetary matters and sound financial management” that Commission, Council and EP are due to conclude as part of the MFF negotiations, it should be clarified that in the case of the RRF assessment, the EP’s scrutiny will go well beyond its usual role in cross-checking delegated acts: MEPs should get access to all information on the negotiations between Commission and member states on individual RRFs at all stages of the process. This should include timely access to the draft cost estimates for reforms and investments. Crucially, the EP should early on have the opportunity to signal to the Commission when it considers individual measures not to be in line with EU policy objectives and the criteria in the RRF regulation and when it has doubts about the cost estimates that member states plan to attach to their measures. After assessing the content of both measures and cost estimates, the EP would then either clear a RRF politically by adopting a resolution specifying that it will not object to the Commission’s decision or it would exercise its veto against the delegated act – in which case a report should then also clarify what changes to the RRF would be considered sufficient for it to approve the plan.

More parliamentary involvement requires speeding up the overall process so that the RRF’s effectiveness is not hampered and funds can flow as soon as possible. To that effect, two changes to the timeline should be made:

- *First*, member states should be obliged to submit draft RRFs by 15 October 2020 so that negotiations with the Commission can start as early as possible and can be concluded by Spring 2021. So far, the RRF regulation only foresees this as a possibility, but not as an obligation.
- *Second*, the Commission should decide on its assessment of the RRF within one month after submission of the final RRF by end-April instead of within four months as currently envisaged. As member states would be required to submit draft plans already in autumn and negotiations will essentially take place before the final RRF will be submitted, a short deadline seems feasible. This would mean that all assessments would be adopted by end-May 2021 in the form of a delegated act. EP and Council would then have until end-July to object; by 1 August, RRFs would then finally take effect unless they get vetoed.

Finally, the RRFs should be sufficiently comprehensive to allow the Commission to legally commit the full RRF envelope already in May 2021; if this is not possible because some member states have difficulties to find eligible expenditure, commitments should be brought to 100% the latest by the end of 2022 and not only to at least 60% as the draft regulation currently suggests in the recitals.

The setup we propose could subsequently become a blueprint for a more democratic and more political governance of the European Semester. In particular, national parliaments should permanently play a bigger role in the formulation of national reform priorities under the Semester and the European Parliament should have a say in the overall formulation of European recommendations to member states. This would finally account for the fact that economic policymaking is not a technocratic exercise, but a deeply political endeavour.

Conclusion

The success of the Recovery Instrument will crucially depend on the ability of the RRF to deliver sizeable macroeconomic impact in hardest-hit member states in line with EU policy goals in a short timeframe. A more democratic governance of the RRF will make this goal more, not less achievable as it will improve ownership, control and democratic legitimacy of the decisions taken.

Box: Why turning the Commission decisions on RRP into a delegated act is legally feasible

We propose turning the Commission decisions on individual RRP into delegated acts rather than implementing acts so as to give the EP a full veto on each decision. Legally, this is feasible as the following analysis shows:

Under the EU Treaties, the Union legislators may confer certain non-legislative powers on the Commission with a view to simpler and more efficient law-making. Such conferral can take the form of delegated acts (article 290 TFEU), where EP and Council both have veto powers, or implementing acts (article 291 TFEU), where only member states through the so-called comitology procedure can block the act.

The ECJ has afforded the Union legislators discretion when it comes to the choice between granting the Commission the power to adopt a delegated or an implementing act in a particular case. It has limited judicial review of such decisions to “manifest errors of assessment” (Case C-427/12 *Commission v Parliament and Council*). Turning the decision on individual RRP into a delegated act therefore has only to clear the bar of not constituting such a manifest error. It does not need to be the only legally sound choice – and we would argue that legally, both delegated and implementing powers could be justified. Therefore, the choice of the instrument is not just a purely legal, but also a political one. And, as we outlined above, for political reasons, a delegated act would be the better alternative.

Whether the Commission decision on national RRP can take the form of a delegated act without the legislators committing a manifest error hinges on whether (1) the decision in question constitutes a measure of general application and (2) the decision in question can be argued to supplement (or amend) the parent regulation, rather than simply implement it.

Criterion 1: Acts of general application

Only measures of general application can be delegated acts under article 290 TFEU. Individual measures must take the form of implementing acts. Decisions on RRP can reasonably be considered measures of general application: It is established ECJ case law that a measure constitutes an act of general application if it applies to objectively determined situations and produces legal effects with respect to categories of persons envisaged in a general and abstract manner (Case 6-68 *Zuckerfabrik Watenstedt*). The same wording can now also be found in the non-binding criteria for the application of articles 290 and 291 TFEU, adopted by the European Parliament, the Council and the Commission in 2019 with a view to providing guidance to the institutions as to whether a conferral of powers to the Commission is of a delegated or implementing nature. The Commission decisions on national RRP are of general application as they do not apply to individual sets of circumstances but to a member state in an objectively determined situation. The general application of a decision is not negated by the fact that it is addressed to one specific member state, as has been confirmed by the ECJ in its case law (see order in Case C-503/07 *Saint-Gobain Glass Deutschland v Commission*).

Criterion 2: Supplementation vs. implementation

The biggest hurdle in demarcating delegated and implementing acts is the distinction between supplementation and implementation. The Treaties do not clarify these terms and, in fact, the distinction between delegated and implementing acts has been the subject of many academic debates and the source of many contentious inter-institutional battles since the entry into force of the Lisbon Treaty.¹

In 2019, the European Parliament, the Council and the Commission adopted the above-mentioned non-binding criteria for the application of articles 290 and 291 TFEU. According to the criteria of the three institutions, the choice for delegated acts should be made *for measures consisting in the adoption of additional rules building upon or developing the content of the basic act*. This would be the case where the measures “affect in substance” the rules laid down in the basic act.

¹ See for example: P Craig, “Delegated Acts, Implementing Acts and the New Comitology Regulation” (2011) 36 European Law Review 671; E Tauschinsky and W Weiß (eds), *The Legislative Choice Between Delegated and Implementing Acts in EU Law: Walking a Labyrinth* (Edward Elgar Publishing, 2018); M Chamon, “Clarifying the Divide between Delegated and Implementing Acts?” 42 Legal Issues of Economic Integration, 175.

By contrast, rules that “specify in further detail” the content of a basic act that provides for a sufficiently precise legal framework as well as the main conditions and criteria should be laid down in implementing acts.

Under the proposed RRF Regulation, the Commission assesses RRP on the basis of a number of criteria that leave ample room for its qualitative judgment. According to article 16(3)(b) of the Regulation, for example, the Commission is to assess whether an RRP contains measures that “effectively contribute to the green and the digital transitions or to addressing the challenges resulting from them”. In doing so, the Commission shall take into account whether the measures will “significantly contribute to establish climate- and environmental-friendly systems and to the greening of economic or social sectors”, “significantly contribute to the digital transformation of economic or social sectors” or “address the challenges resulting from the green and/or digital transitions” (Point 2.2 Annex II). In this example, in order to assess whether a measure significantly contributes to the green and digital transformation, the Commission must make a policy judgment as to what such green and digital transformation is to entail. It must also make policy decision as to how much money – within the limits set down in the Regulation – is to be granted to the member states on the basis thereof. This clearly goes beyond simply specifying in further detail the criteria; instead, this policy judgment affects the very substance of the criteria. The same goes for the other criteria, which are equally drafted in a way that leaves ample room for qualitative judgment.

Therefore, it can be reasonably argued that in order to take a decision as to whether a member state has fulfilled the criteria in the RRF Regulation, the Commission must in fact adopt additional rules guiding its assessment that not just implement but further develop the criteria laid down in the Regulation. To classify this as falling within the scope of delegated acts would not, at the very least, seem to constitute a manifest error of assessment.

In sum, this means that turning the Commission decision into a delegated act is legally possible. Both the choice of an implementing act and a delegated act seem justifiable in this regard. The question of whether the EP should participate in the adoption of RRP assessments on equal footing with member states or not is thus not a legal, but a political one.

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